SHOOTING JUSTICE JACKSON'S "LOADED WEAPON" AT YSAR HAMDI: JUDICIAL ABDICATION AT THE CONVERGENCE OF KOREMATSU AND MCCARTHY

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CONTENTS

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PROLOGUE

Professor Vernellia Randall and I had a conversation recently in which she described to me the kinds of negative responses she gets to her marvelous website on race and health law.[1] *She organized the responses into three categories: (1) those which simply spewed generic obscenities at her; (2) those which spewed specific racial obscenities; and (3) those which raised objections based upon more traditional arguments such as "colorblindness."*[2] *She related to me how she initially tried to answer and engage those objections in the third category, but that she soon realized that it was a mistake.*[3]

I asked whether the primary reason she stopped was her sense of futility or merely having too little time to respond, to which she answered, "neither."[4] *"Too often," she said, as the dialogue went on and her correspondents were unable to convince her of the error of her ways, these "rational objections" slowly degenerated into those of the first two categories.*[5] *While we laughed together about the irony, the laughter was bittersweet because it confirmed to both of us how lying underneath the shallow surface of many "rational" objections to the struggle for racial equity lurk the same unseemly and violent attitudes that have historically marked American racism.*[6] *In an even larger sense, it confirms that we often have as much, perhaps even more, to fear from that which is hidden than from that which is apparent.*

Mari Matsuda puts it another way: "[t]here is naked power, which grabs and smashes without need for denial or justification. There is legitimized power, which justifies without denying. There is masked power,

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1. Conversation with Vernellia R. Randall, Professor of Law, University of Dayton School of Law, at a Law School Admissions Council conference in Seattle, Wash. (June 19, 2002) [hereinafter Randall, Conversation]. Professor Randall's websites may be found at: Vernellia R. Randall, *Race, HealthCare and the Law*, *at* http://academic.udayton.edu/health/ (last modified Sept. 9, 2003); Vernellia R. Randall, Race, Racism and the Law, *at* http://academic.udayton.edu/race/ (last modified Nov. 13, 2003).

2. Randall, Conversation, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; *see* Danielle Conway-Jones, *Beyond* Rice v. Cayetano*: It's Impacts and Progeny: The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in* Rice v. Cayetano, 3 ASIAN-PAC. L. & POL'Y J. 7 n.13 (2002) (citing Elizabeth S. Anderson, *What Are Racism and Sexism?*, Race, Gender, and Affirmative Action, *at* http://www-personal.umich.edu/~eandersn/biblio.htm (last modified June 2003)) (identifying three different types of racism other than overt racism: unconscious/covert racism; racism by proxy in which a pretextual basis for discrimination is accepted because it tracks race; and institutional racism, which systemically perpetuates the legacy of discrimination).

which never justifies, because the denial of its own existence is complete."[7]

INTRODUCTION

We pride ourselves that we are a nation ruled by law.[8] We take comfort in the fact that law seems to provide a way to escape the arbitrariness of the caprice and prejudice of the powerful. Yet, because the rule of law is inherently bound to issues of societal power and privilege, the rule of law is not always the triumph of justice.[9]

It is the law that has been the catalyst and mechanism for both progress and reaction. More than simply a tool to wield power and/or wrest it, its operation is clothed in an almost mystical aura of objectivity and neutrality. Indeed, it is that aura that gives it the immense power and influence it has.[10] But the law has never been value free.[11] It condoned and

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7. Mari J. Matsuda, *Foreword: McCarthyism, The Internment and the Contradictions of Power*, 40 B.C. L. REV. 9, 9 (1998).

8. Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs To Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 428 (2002) [hereinafter Saito, *Asserting Plenary Power Over the "Other"*] ("The United States portrays itself as a nation of laws, laws that give optimal protection to human rights and democratic processes, laws that apply equally to all 'citizens' and 'fairly' to all others within its jurisdiction" (citations omitted)).

9. *E.g.*, Kimberlé Crenshaw, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995) (explaining that critical race theory attempts to show the relationship between racial subordination and abstract notions such as "the rule of law" and to understand the relationship between racial power and law).

10. *See, e.g.*, ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 12 (2001) [hereinafter YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION]. Yamamoto stated:

> Since the 1980s and '90s, critical legal scholars have offered strong critiques of the ostensible objectivity and neutrality of law and the legal process. These theoretical schools have drawn upon insights of legal realism from the 1930s and '40s. The legal realists argued that law was not an autonomous, self-contained discipline, nor was it objective . . . .
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> . . . [Subsequently, Critical Legal Studies] posits that law and the legal process [is] largely a function of hidden politics . . . . CLS observed that . . . legal decision-making tends to serve the interests of those in power while maintaining systemic legitimacy through the impression of legal neutrality . . . .
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> . . . [Critical Race Theory] examines racial justice in connection with race, law and social structure. It recognizes that race is a social construction that plays an essential part in structuring and representing the social world.

Id.

11. *See, e.g.*, Richard Delgado, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE xiv (Richard Delgado ed., 1995). Delgado writes:

> Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture. Formal equal opportunity—rules and laws that insist on treating blacks and whites (for example) alike—can thus remedy only the

celebrated slavery and segregation as well as outlawed it;[12] it created universal suffrage, although for years voting was restricted to one gender and one race;[13] it decides what is racist and what is not;[14] it decides who is of color and who is not and whether it matters;[15] it decides what is an inalienable right and what is not[16]—in essence, law determines who and what is protected from whom and from what. It is the basis of our interrelationship with one another, and it is simultaneously malleable and unyielding. It provides a mirror in which we can see our relationships to others and what we need to do to change it—if we can.

After airplanes were rammed into the World Trade Center on September 11, 2001, more than twin towers were destroyed. The American sense of invincibility was shattered that day as well, in a way that the United States was similarly stunned after Pearl Harbor. It was that sense of vulnerability in deadly combination with American racism that led to the imprisonment of Japanese Americans during World War II. Numerous legal scholars, echoing Justice Jackson's dissent in *Korematsu v. United States*,[17] have warned that the *Korematsu* decision lies like a "loaded weapon" ready to be used in times of national stress.[18] In the recent

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> more extreme and shocking sorts of injustice, the ones that do stand out. Formal equality can do little about the business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation, and despair.
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> . . . Starting from the premise that a culture constructs social reality in ways that promote its own self-interest (or that of elite groups), [critical race] scholars set out to construct a different reality. Our social world, with its rules, practices, assignments of prestige and power, is not fixed; rather, we construct it with words, stories, and silence.

Id.

12. *E.g.*, Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (endorsing segregation doctrine). *But see* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (holding segregated education unconstitutional).

13. *E.g.*, U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XIX, § 1 ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of sex.").

14. *E.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (striking down a city ordinance prohibiting hate speech based on race, gender, and religion).

15. *E.g.*, Ozawa v. United States, 260 U.S. 178, 196-97 (1922) (holding "free white persons" eligible for naturalization did not include non-Caucasians).

16. *E.g.*, Roe v. Wade, 410 U.S. 113, 153-54 (1973) (upholding a woman's right to terminate pregnancy).

17. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

18. *E.g.*, Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27/28 AMERASIA J. 51, 60-61 (2001-2002) ("Our collective task, then, is to turn Justice Jackson's warning into . . . an affirmative challenge. The time is now to unload that weapon."); Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40

decision of *Hamdi v. Rumsfeld*, the Fourth Circuit denied an inquiry into the facts alleged by the United States government that would justify an "enemy combatant" classification of an American citizen, essentially stripping him of all constitutional protections.[19] With that decision, the "loaded weapon" has been picked up, fired, and reloaded.

But the troubling aspects of the Fourth Circuit's *Hamdi* decision are more complex and subtle than simply a repetition of *Korematsu's* racial reasoning and explicitly racial result.[20] Group racial stereotyping lies not directly at the heart of the *Hamdi* decision as it did in *Korematsu*, but indirectly.[21] It is the response to a "hidden" racial message of anti-Muslim sentiment. In the same sense that the *Korematsu* court attempted, but failed, to de-emphasize the racial underpinnings of its decision, the *Hamdi* court was able to exploit racial messages without acknowledging them.[22]

Moreover, the *Hamdi* decision also signals a response to a larger political agenda; the suppression of progressive movements and dissent reminiscent of the anti-communist crusades of the McCarthy era. At a time in which the United States' unilateral, acquisitive, and militarily aggressive foreign policy[23] combines with a faltering domestic economy[24] and a retreat from the progressive advances in areas such as civil rights of the previous decades,[25] there is a necessity for the government to create an

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B.C. L. REV. 179, 254 (1998) ("Jackson's reference to the loaded weapon implied the direct precedential effect the internment cases might have under the doctrine of stare decisis.").

The "loaded weapon" is a reference to a phrase Justice Jackson used in his dissent in *Korematsu*:

> [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).

19. Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003) [hereinafter Hamdi III].

20. *See Korematsu*, 323 U.S. at 222-23.

21. *See Korematsu*, 323 U.S. at 222-23; *Hamdi III*, 316 F.3d at 462-77.

22. *See Korematsu*, 323 U.S. at 222-23; *Hamdi III*, 316 F.3d at 462-77.

23. *E.g.*, David Sanger, *Bush Says U.S. Willing To Go It Alone in Iraq*, N.Y. TIMES, Mar. 7, 2003, at A1; *see also*, Saito, *Asserting Plenary Power Over the "Other," supra* note 8, at 428 ("[The United States'] international reputation is that of a state reluctant to ratify human rights agreements and unwilling to accept the jurisdiction of international decision-making bodies.").

24. *E.g.*, Martin Wolk, *U.S. Could Slip Back Into Recession: Grim Employment Report Suggests 'Double-Dip' Scenario*, MSNBC NEWS, Mar. 7, 2003, *at* http://www.msnbc.com/news/882218.asp.

25. *E.g.*, Janet Hook, *Conservative Social Agenda a GOP Challenge; Activists Hope to*

environment that will disrupt and chill domestic dissent and progressive political activism.[26] Indeed, the provisions of such measures as the *USA Patriot Act* have already drastically curtailed civil liberties.[27] So massive

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Make Headway on Key Issues with Republicans in Control of Congress, L.A. TIMES, Jan. 19, 2003, at A21 (reporting that the Bush administration has allied itself with anti-affirmative action forces and anti-abortion activists).

26. *E.g.*, Philip A. Thomas, *Emergency and Anti-Terrorist Powers: 9/11: USA and UK*, 26 FORDHAM INT'L L.J. 1193, 1205 (2003).

27. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

The Lawyers Committee for Human Rights has published two reports: FIONA DOHERTY ET AL., LAWYERS COMM. FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES (2003), http://www.lchr.org/us_law/loss/imbalance/powers.pdf [hereinafter DOHERTY ET AL., IMBALANCE OF POWERS] and FIONA DOHERTY ET AL., LAWYERS COMM. FOR HUMAN RIGHTS, YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002), http://www.lchr.org/us_law/loss/loss_report.pdf [hereinafter DOHERTY ET AL., YEAR OF LOSS]. These reports comprehensively chronicle the government's extraordinary incursion into traditional civil liberties protections post-9/11. DOHERTY ET AL., IMBALANCE OF POWERS, *supra* note 27; DOHERTY ET AL., YEAR OF LOSS, *supra* note 27. The repressive activities have been organized into five sections: "Open Government"; The "Right to Privacy"; "Treatment of Immigrants, Refugees and Minorities"; The "Security Detainees and the Criminal Justice System"; and "The United States and International Human Rights Protection." DOHERTY ET AL., IMBALANCE OF POWERS, *supra* note 27, at ii-iii. The following is the basic overview of the reports:

> An analysis of challenges to the principle of *Open Government* covers increasing government secrecy and attempts to limit public debate. This includes withholding from Congress information on the implementation of the USA PATRIOT Act; obstructing investigations by the General Accounting Office, the investigative arm of Congress; and the secretive process with which new draft anti-terrorism legislation has been prepared by the Department of Justice . . . .
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> The erosion of the *Right to Privacy* is illustrated by a series of initiatives by which federal powers of surveillance, search and seizure, and intelligence gathering have been vastly extended in ways that may affect everyone in the United States. They include the military's Total Information Awareness Program to create data profiles on citizens by tapping and "mining" public and private databases; the use of expanded search and seizure powers under the USA PATRIOT Act to seize library, bookstore, and other private records; increased powers to intercept telephone and internet communications; and the lifting of restrictions on the use of special foreign intelligence powers in ordinary criminal prosecutions. Federal proposals also would lift restrictions on monitoring and surveillance of the ordinary citizen by city and state police . . . .
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> In assessing the *Treatment of Immigrants, Refugees, and Minorities*, this report addresses the way some immigrant communities have continued to bear the brunt of many of the Justice Department's anti-terrorism initiatives . . . [such as] the monitoring, registration, detention, and secret deportation of immigrants against whom no charges [would] have been made; restrictions on visitors and immigrants alike from many parts of the world; and a reversal of the United States' traditional welcome to refugees fleeing persecution abroad . . . .
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> A description of the . . . *Security Detainees and the Criminal Justice System*

has this assault been by the Bush administration's Attorney General, John Ashcroft, that even traditionally conservative politicians such as former Republican House Majority Leader Richard Armey have expressed disquiet about his policies and initiatives.[28]

Thus, like *Korematsu*, the *Hamdi* decision is deeply entrenched in political value judgments and assumptions, but comes clothed in the rhetoric of military necessity and cloaked in the legitimacy and "objectivity" of law:

> [N]ational security crises coupled with racism or nativism and backed by the force of law generate deep and lasting social injustice. Court rulings in particular legitimize even extreme, albeit popular, governmental actions—in the 1940s, the internment; yesterday [an immigrant's] . . . secret incarceration; today, potentially racial profiling and harassment. Once legitimated by courts, government excesses and human suffering take on the mantle of normalcy.[29]

In essence, the *Hamdi* decision "legitimizes" two converging and complementary forces: the necessity to define national identity in relationship to a racialized "Other" and the use of that national identity to promote and justify an agenda of suppressing progressive movements, which threaten a right-wing political vision for this country's future.[30] It

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> covers the increasing reliance on ad hoc measures the United States has created to deal with those suspected of ties to al Qaeda, including: the indefinite detention of U.S. citizens, the proposed use of military commissions, and the status of detainees held in Guantanamo Bay, Cuba. At issue also is the power of the presidency to identify any American citizen as an agent of an enemy and on that basis to strip that citizen of his or her liberty and other rights under U.S. law . . . .
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> The final chapter of the reports concerns the *United States and International Human Rights Protection* - the international repercussions of the changes in U.S. policy and practice. The examples presented show that some of the most draconian aspects of what the U.S. government has done in response to September 11 are being mimicked by repressive governments to justify human rights violations against peaceful advocates of democratic values.

Id. at ii-iii. For an account of the legislative history of the *USA Patriot Act* as well as an overview of the Bush administration's early reaction to September 11, including the President's *Military Order of November 13, 2001*, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), that authorized the use of military commissions to try suspected terrorists, *see* Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 373 (2002).

28. Eric Lichtblau & Adam Liptak, *Threats and Responses; On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1 ("The former Republican congressman Dick Armey, on his way out the door last year as House majority leader, said he thought Mr. Ashcroft and the Justice Department were 'out of control.'").

29. Yamamoto & Serrano, *supra* note 18, at 57.

30. Gott, *supra* note 18, at 252. As Gil Gott aptly observes:

should come as no accident or surprise that the Fourth Circuit is considered one of the most politically conservative courts in the country.[31]

In this sense, the *Hamdi* decision and its implications are even more problematic and sobering than *Korematsu*. *Korematsu*'s racial persecution of Japanese Americans aided a war effort by strengthening a white American racial identity against an Asiatic foreign power.[32] *Hamdi*, on the other hand, uses an underlying racial construction of a terrorist "Other" to facilitate not only America's foreign policy objectives, but a larger and on-going right-wing social and political domestic agenda.[33] It is the morphing together of these two repressive American themes—the racism of *Korematsu's* presumptively disloyal foreigner and the suppression of presumptively "unAmerican" progressive ideas and social movements as exemplified by, but not limited to, the McCarthy era[34]—made to appear

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[T]he *meanings* attached by actors to national security, not "real threats out there," are of primary significance . . . .

> National security is, in this sense, a metaphor that ascribes to "the nation" the ability to perceive safety and well-being . . . . [and] collapses the multiplicity of society into a monolithic sameness of nation . . . . National interest and thus determinations of national security, assumed to be legitimate and rational, are valorized when set over against their Other—a realm of purely passionate and chaotic non-security and the non-rationality of interest misperception.

Id. (citations omitted).

31. *E.g.*, Mary R. Falk, *Shooting from the Lip:* United States v. Dickerson, *Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 32 n.140 (2000). Journalists routinely discuss the political predilections of judges. *Id.* For example, *The New York Times* has reported that the Fourth Circuit is known as a "model of conservative pursuits." *Id.* (quoting Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1, A22); Clay Calvert & Kelly Lyon, *Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?*, 89 KY. L.J. 13, 50 (2000) (describing the Fourth Circuit as "traditionally one of the most conservative appellate courts in the United States . . . .").

32. Gott, *supra* note 18, at 269. Gott adds: "[t]he racial unity . . . in the judicial voice of *Korematsu* and *Hirabayashi* provided a kind of historical counterpoint—thus aiding in the restoration of America's constitutive Anglo-Saxon unity—precisely at the quintessential modern nation state-defining moment, 'wartime.'" *Id.* (citing JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 190-91 (Thomas McCarthy trans., Beacon Press 1979)).

It should also be pointed out that the Japanese American internment was in part motivated by economic interests as well: "[p]art of the cry for Japanese-American internment was raised by 'influential agriculturalists who had long cast their covetous eyes over the coastal webwork of rich Japanese-owned land, a superb opportunity had thus become theirs for the long-sought expulsion of an unwanted minority.'" Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 394 n.28 (1998) (quoting MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 36 (1976)).

33. *See supra* notes 23-28 and accompanying text.

34. Natsu Taylor Saito, *Seventh Annual Latcrit Conference, Latcrit VII, Coalition*

neutral by judicial rhetoric, that holds tremendous dangers for generations to come.

I. *HAMDI V. RUMSFELD*: WHEN JUDICIAL REVIEW IS A COVER FOR GOVERNMENTAL IMPUNITY

On January 8, 2003, the Fourth Circuit Court of Appeals held that a declaration by Michael Mobbs, a Special Advisor to the Under Secretary of Defense for Policy (the Mobbs Declaration) that set forth the circumstances of the detention of Yaser Esam Hamdi, an American citizen, as an "enemy combatant" was sufficient "by itself" to justify his detention.[35] The designation of Hamdi as an enemy combatant was not merely a technical classification, but one which stripped Hamdi of practically every constitutional right afforded an American citizen deprived of his or her liberty interest,[36] including ones as basic as the right to counsel, knowledge of the specific charges, and access to a judicial tribunal.[37]

The district court below, United States District Judge Robert Doumar, had been instructed earlier by the Fourth Circuit to consider the sufficiency of the Mobbs Declaration,[38] and on August 16, 2002, it found that the Mobbs Declaration fell "far short of supporting" Hamdi's incarceration and ordered the government to produce numerous documents related to the

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Theory and Praxis: Social Justice Movements and Latcrit Community - Part II Latcritical Perspectives: Individual Liberties, State Security, and the War on Terrorism: Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent, 81 OR. L. REV. 1051, 1066 (2002) [hereinafter Saito, *Seventh Annual Latcrit Conference*]. "A consistently emerging theme in the suppression of political dissent is that those who disagree with government policy are labeled 'unAmerican' and, whenever possible, portrayed as agents of foreign powers." *Id.*

35. Hamdi III, 316 F.3d at 450, 459 (4th Cir. 2003).

36. Hamdi v. Rumsfeld, 296 F.3d 278, 282-83 (4th Cir. 2002) [hereinafter Hamdi II] (reversing a district court order mandating that Hamdi be allowed to meet with his attorney, in this case the public defender). Hamdi, after his capture in Afghanistan was held initially at Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba and was subsequently transferred to the Norfolk Naval Station Brig. *Id.* at 280; *see also* Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002) [hereinafter Hamdi I].

37. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 532 (E.D. Va. Aug. 14, 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003) [hereinafter Hamdi District Court].

38. *Id.* at 530. The Mobbs Declaration was attached to the government's response to a petition by Hamdi for a writ of habeas corpus. *Id.* at 528, 533. It confirmed the factual allegations that Hamdi was seized in Afghanistan by allied forces during the United States' military campaign there and had been designated at that time as an "enemy combatant." *Hamdi III*, 316 F.3d at 461. The declaration alleged that Hamdi had traveled to Afghanistan in July or August of 2001; affiliated with a Taliban unit; received weapons training; "was captured when his Taliban unit surrendered to Northern Alliance forces"; and that at the time of surrender was in possession of an AK-47 rifle. *Id.* The Mobbs Declaration consisted of two pages and nine paragraphs. *Hamdi District Court*, 243 F. Supp. 2d at 533.

circumstances of Hamdi's capture and detention.[39] These documents included copies of Hamdi's statements and the notes and identities of his interrogators.[40]

The district court characterized the Mobbs Declaration as "little more than the government's 'say-so'" and went on to state that if it "were to accept the Mobbs Declaration as sufficient justification" for Hamdi's detention, "it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp."[41] Judge Doumar concluded with an impassioned plea for due process:

> The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws . . . . While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration.[42]

Despite the district court's strongly worded viewpoint, the Fourth Circuit sustained the government's appeal and held that "[n]o further factual inquiry [was] necessary or proper"[43] and further sustained the government's objection to the production of evidence related to the Mobbs Declaration.[44]

The Fourth Circuit reasoned that the government was entitled to "great deference" when dealing with matters "'implicating sensitive matters of foreign policy, national security, or military affairs.'"[45] It went

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39. *Hamdi III*, 316 F.3d at 462. In fact, the district court questioned the government's fundamental assertion that Hamdi was affiliated with the Taliban:

> [The Mobbs Declaration] states that Hamdi was "affiliated with a Taliban military unit and received weapons training." The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status . . . . Indeed, a close inspection of the declaration reveals that [it] never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban.

Hamdi District Court, 243 F. Supp. 2d at 534 (internal citations omitted).

40. *Hamdi III*, 316 F.3d at 462.

41. *Hamdi District Court*, 243 F. Supp. 2d at 535.

42. *Id.* at 536.

43. *Hamdi III*, 316 F.3d at 459.

44. *Id.* at 471.

45. *Id.* at 463 (quoting *Hamdi II*, 296 F.3d at 281).

on to note that the procedural safeguards that ordinarily pertain to citizens in the area of "criminal prosecutions do not translate neatly to the arena of armed conflict . . . . [and] if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain."[46] Yet, the exercise of judicial oversight in determining the sufficiency of the Mobbs Declaration was not, in essence, solely an issue of whether a court showed deference to "military judgment."[47] It was, more fundamentally, a balancing of deference to "military judgment in the field" and the suspension of basic civil liberties for an individual American citizen.[48] And in this regard the Fourth Circuit's "deference" bordered on complete abdication.[49] In its twenty-seven page decision, the Fourth Circuit devoted less than a dozen paragraphs to the fundamental question under its review: the sufficiency of the Mobbs Declaration.[50] This is significant since the Fourth Circuit

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46. *Id.* at 465. The Fourth Circuit opined that detention of enemy combatants in lieu of prosecution served two purposes: preventing them "from rejoining the enemy" and relieving commanders of "litigating the circumstances of a capture halfway around the globe." *Id.* However, since the court itself confined itself to the rare and narrow context of "the undisputed detention of [an American] citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces," it is hard to imagine that the burden of prosecution in those specific and narrow circumstances would be greatly burdensome or prejudicial to the military effort. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 472.

50. *Id.* at 466-69. The bulk of the *Hamdi III* opinion addressed issues of whether assuming the government's assertions about Hamdi were valid and whether Hamdi's detention would be consequently constitutionally impermissible as a matter of law. *Id.* at 464-69, 471-76. While these issues are of immense import, they are beyond the limited scope of this piece that solely focuses on the lack of judicial oversight and scrutiny of the government's assertions about Hamdi. Indeed, the necessity of courts testing the truth or falsity of those assertions to protect those who are innocent as well as to mete out appropriate justice to those who are guilty is precisely what this piece is advocating:

> The government must be empowered to repel actual threats to its existence. At the same time, especially in an era of expanding governmental control over its own citizens in response to perceived threats to national security, a constitutional democracy cannot afford to have its courts withdraw from their historically "watchful" role over the most cherished liberties of its people.

Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 62 (1986) [hereinafter Yamamoto, Korematsu *Revisited*].

It is worth noting that the Fourth Circuit failed to cite *Korematsu*, a clearly analogous case, perhaps because of *Korematsu*'s troubled legacy and reputation. *See, e.g.*, Alfred C. Yen, *Introduction: Praising With Faint Damnation—The Troubling Rehabilitation of* Korematsu, 40 B.C. L. REV. 1, 1-3 (1998). Moreover, it is even more ironic that the Fourth Circuit dismissed Hamdi's argument that his detention as a United States citizen was barred by 18 § U.S.C. 4001(a) (2000) ("No citizen shall be imprisoned or otherwise detained by the

acknowledged early in its opinion that the duty of the judiciary to protect "individual freedoms does not simply cease" in wartime.[51] In fact, it quoted *Ex parte Milligan*[52] for the proposition that the judiciary should be wary since there could come a time when government would "seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril . . . ."[53] Yet, despite

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United States except pursuant to an Act of Congress.") partly on the grounds that § 4001(a) had "functioned principally to repeal the Emergency Detention Act," the thrust of which, the Fourth Circuit opined, was inapplicable. *Hamdi III*, 316 F.3d at 467-68.

The Fourth Circuit asserted that the repeal of the Emergency Detention Act (which originally provided for the detention of individuals "'likely to engage in espionage or sabotage' during 'internal security emergencies'") was enacted to prevent the recurrence of incidents such as the Japanese American internment. *Id.* at 468 (citing H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436). Completely undiscussed was the fact that Hamdi's constitutional protections were suspended on the very grounds that the internment had been justified: military security. *See Hamdi III*, 316 F.3d at 462-77.

Instead, the Fourth Circuit relied principally upon *Ex parte Quirin* for the proposition that citizenship would not serve as a bar to the suspension of constitutional rights of a captured enemy belligerent. 317 U.S. 1, 37 (1942). Yet, Professor Harold Koh has pointed out that, even in the case of non-citizens:

> *Quirin* nowhere gave the president carte blanche unilaterally to create an alternative military system of criminal justice for suspicious aliens captured abroad. Nor did *Quirin* authorize the president unilaterally to shift all cases involving war crimes by detained noncitizens into military commissions. In *Quirin*, Congress had formally declared war, which it has not done here, and had specifically authorized the use of military commissions in its Articles of War.

Harold Hongju Koh, *Agora: Military Commissions: The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 (2002) (citations omitted). Moreover, it has been pointed out that, while there was an issue of whether military tribunals were constitutionally permissible, nowhere in *Ex parte Quirin* is there a proposition that enemy combatant status justifies the restriction of all basic due process protections. *See* Margaret Chon & Eric K. Yamamoto, *Resurrecting* Korematsu*: Post-September 11th National Security Curtailment of Civil Liberties*, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 9 (July 8, 2003), http://www1.law.ucla.edu/~kang/racerightsreparation/UpdateCh8/chonyamamotoracerightsch8.pdf ("Moreover, the [*Ex parte Quirin*] Court made clear that the government's enemy combatant designation was subject to judicial review and that enemy combatants have standing to contest convictions for war crimes by habeas corpus proceedings.").

51. *Hamdi III*, 316 F.3d at 464.

52. 71 U.S. 2 (1866).

53. *Hamdi III*, 316 F.3d at 464 (quoting *Ex parte Milligan*, 71 U.S. at 120). Citing *Ex parte Milligan* for the sole proposition that courts should review citizen detentions is the legal equivalent of asserting that *Moby Dick* was a story about a whale.

Ex parte Milligan was a Civil War case in which a citizen had been sentenced by a military commission to death for participation in an armed rebellion against the United States. 71 U.S. at 6-8. The Supreme Court granted his writ of habeas corpus and held that his conviction violated the Fourth, Fifth, and Sixth amendments. *Id.* at 119. It held that only when "courts are actually closed, and it is impossible to administer criminal justice according to law . . . ." that military law may be exercised against citizen civilians. *Id.* at 127. Moreover, the Court held that martial rule was limited by the duration of the necessity

this clear warning by the *Ex parte Milligan* Court of the necessity for courts to be mindful of constitutional protections in the midst of perilous times, the Fourth Circuit bloodlessly concluded that *Ex parte Milligan* stood merely for the elemental proposition that "[t]he detention of United States citizens must be subject to judicial review."[54]

It simply stated, without authority or explanation, that the production of the government notes of Hamdi's statements "may contain the most sensitive and the most valuable information for our forces in the field."[55] However, even assuming the Fourth Circuit's speculation to be true, it is difficult to understand their fears given the ability by the government to redact sensitive intelligence information and to have such statements submitted under seal and in camera.

The Fourth Circuit then went on to conclude that the simple production of a list of interrogators, copies of "statements by members of the Northern Alliance regarding Hamdi's surrender," the date of his capture, and "the dates and location of his subsequent detention" would make "litigation . . . the driving force in effectuating and recording wartime detentions."[56] It grandly opined that the production of statements by Northern Alliance members would "place a strain on multilateral efforts during wartime."[57]

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and the "locality of actual war." *Id.*

Not that the Court was unconcerned about the dangers presented by the tumultuous times during the Civil War period. *Id.* at 130. The Court acknowledged in prophetic language that:

> [R]esistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities . . . . Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct.

Id. (emphasis added).

Yet, despite that concern, the Court strongly and passionately advocated the critical importance of the judiciary performing a "watchful care [over] those [e]ntrusted with the guardianship of the Constitution . . . ." particularly in times of great turmoil and passion. *Id.* at 124. In impassioned rhetoric the Court warned that:

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; . . . [Our Founding Fathers] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen.

Id. at 125.

54. *Hamdi III*, 316 F.3d at 464 (citing *Hamdi II*, 296 F.3d at 283).

55. *Id.* at 470.

56. *Id.*

57. *Id.* at 471.

Given the magnitude of the Fourth Circuit's hyperbole, it is difficult to keep in perspective the fact that the case before it involved the narrow and rare circumstances of an individual American citizen detained on a foreign battlefield.[58] Indeed, it is noteworthy that the Fourth Circuit failed to acknowledge that only a few months earlier John Walker Lindh, an American citizen who was captured by American soldiers fighting with the Taliban in Afghanistan and who ultimately confessed to providing services as a Taliban soldier, was afforded the same constitutional protections denied Hamdi without any of the prejudice to either the Afghanistan war effort or the efficiency of the American military in general.[59] Yet the court concluded, in a stunning exercise of circular reasoning, that it need not further investigate the accuracy of the Mobbs declaration since the "factual averments in the affidavit, *if accurate*, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by [the Constitution]."[60]

For the Fourth Circuit, the seizure of an American citizen abroad in a zone of active combat alone was sufficient to trigger the court's inability to test the executive's designation of that citizen as an "enemy combatant."[61] It concluded:

> [W]e hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an [sic] zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention.[62]

Thus, the Fourth Circuit clearly and unequivocally signaled that the test of the *truth* of the "factual assertions which would establish a legally valid basis for the petitioner's detention" was not within their judicial purview.[63]

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58. *See id.* at 459.

59. *See* Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L. J. 1, 37 (2002) (analyzing the media coverage and treatment of various post-September 11 terrorism prosecutions and concluding that race was a driving force in how specific factual incidents and defendants were portrayed and treated).

60. *Hamdi III*, 316 F.3d at 473 (emphasis added).

61. *Id.* at 459, 461-62.

62. *Id.* at 476.

63. *Id.*

II. *KOREMATSU V. UNITED STATES*: WHEN "MILITARY NECESSITY" IS A COVER FOR GOVERNMENTAL IMPUNITY

The inquiry into the factual basis for the government's assertion of its heightened power during times of national security crisis is a question of crucial importance because it is in precisely this area that the government's historical actions have been most suspect.[64] In the infamous *Korematsu* case, the Supreme Court upheld the constitutionality of a military exclusion order that excluded all persons of Japanese ancestry from certain areas of the West Coast.[65] The conclusion of the *Korematsu* opinion is worth noting:

> It is said we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order.[66]

This is a remarkable paragraph in the annals of jurisprudence. Although it was undisputed that Korematsu was a loyal American citizen and that the "obvious purpose of the [exclusion] order[] . . . was to drive all citizens of Japanese ancestry into Assembly Centers,"[67] the Court grandly shrugged off any suggestion that this was a case dealing with "the imprisonment of a loyal citizen . . . because of racial prejudice."[68] Despite the fact that "exclusion [was] sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment,"[69] the Court concluded that any suggestion of racial prejudice "merely confuses the issue."[70] In a stunning aside, the Court revealed itself by stating that "[r]egardless of the *true nature*"[71] of the camps, the issue was one solely of the validity of the exclusion order and not the camps:

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64. *See* Korematsu v. United States, 323 U.S. 214, 222-23 (1994).
65. *Id.*
66. *Id.* at 223.
67. *Id.* at 229 (Roberts, J., dissenting).
68. *Id.* at 223.
69. *Id.* at 236-37 (Murphy, J., dissenting).
70. *Id.* at 223.
71. *Id.* (emphasis added).

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue . . . . [Japanese American exclusion was instituted] because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.[72]

One can only assume the Court meant that even if the camps and the incarceration were the product of racism, the issue as the Court saw it was solely whether the Court should defer to the military's construction of what constituted a "military necessity."[73]

Indeed, Justice Jackson, in chillingly prophetic words today, dissented and asked whether the Court could make a decision on the propriety of exclusion "having no real evidence before it" except an "unsworn, self-serving statement, untested by any cross-examination, that what [was done] was reasonable."[74] He continued:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself . . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[75]

Professor Dean Hashimoto has observed that the "complicated issue in *Korematsu* involves deciding what amount of deference, if any, should be accorded by the Court to government authorities in times of perceived emergency."[76] He continued to note that the "central lesson we learn from *Korematsu* appears to be that there is an important role for judicial review

72. *Id.* at 223-24.
73. *Id.* at 234 (Murphy, J., dissenting).
74. *Id.* at 245 (Jackson, J., dissenting).
75. *Id.* at 245-46 (Jackson, J., dissenting).
76. Dean M. Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 120 (1996).

of substantive decisions by military authorities" and that "the Court should recognize that *Korematsu* stands for the principle of judicial abstention."[77]

However, the factual support upon which the *Korematsu* Court relied for its upholding of the military order was "the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal."[78] The Court's sole basis of empirical evidence for the military's assertion of disloyalty were the answers on a questionnaire given to Japanese American internees seventeen years of age or older.[79] The Court concluded that answers to this questionnaire confirmed "[t]hat there were members of the [Japanese American community] who retained loyalties to Japan."[80] However, as Professor Hashimoto has pointed out:

> On closer analysis, the statistical evidence was extremely weak for what the Court wanted to prove. The Court relied upon a questionnaire administered approximately a year after the incarceration began. Thus, military authorities did not rely on this evidence when they decided to impose the exclusion order. Furthermore, the questionnaire was hardly a valid means of determining risk of espionage or subversive activity. Many refused to swear unqualified allegiance to protest the conditions of the internment camps or to avoid military service.[81]

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77. *Id.* at 124-25.

78. *Korematsu*, 323 U.S. at 219.

79. *See* Iijima, *supra* note 32, at 403 n.60 (citing WEGLYN, *supra* note 32, at 136-40). Weglyn stated:

> [T]he "Loyalty Oath" consisted of two identical questions in two different forms—one for draft age Nisei, the "Statement of United States Citizenship of Japanese Ancestry," and the other for Issei and female Nisei, "Application for Leave Clearance." They were as follows:
>
> No. 27. Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?
>
> No. 28. Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign and domestic forces, and foreswear any form of allegiance or obedience to the Japanese emperor, to any other foreign government, power or organization?

WEGLYN, *supra* note 32, at 136-40.

80. *Korematsu*, 323 U.S. at 219 (observing that "five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.").

81. Hashimoto, *supra* note 76, at 108.

> The Loyalty Oath questions permitted only "yes" or "no" answers. However, irrespective of their political views, the fact remained that "yes" answers to the loyalty questions for the Issei, who were not citizens of the United States, left

III. THE RACIAL UNDERPINNINGS OF *KOREMATSU*

In fact, the government lied to the *Korematsu* Court about the necessity of incarcerating Japanese Americans.[82] Professor Eric Yamamoto, almost two decades ago, published a piece in which he explored the implications of *Korematsu*,[83] not solely from the perspective of the racism at its core, but from the equally disturbing stance it took with respect to the standard of judicial review of government actions taken in the name of national security.[84] He wrote that the application of "a deferential standard of review to the information proffered by the government, the *Hirabayashi v. United States* and *Korematsu* Courts in essence validated the curfew and evacuation on faith . . . [and] that faith was badly misplaced."[85]

On April 19, 1984, Judge Marilyn Hall Patel, United States District Judge for the Northern District of California, granted Fred Korematsu's writ of coram nobis vacating his original conviction for violating the military exclusion order over forty years earlier.[86] What was particularly extraordinary was the basis upon which the writ was granted; during the period the propriety and constitutionality of Japanese American internment was examined and decided, there was "critical contradictory evidence known to the government and knowingly concealed from the courts" related to the "critical question of military necessity."[87]

Professor Yamamoto carefully catalogued the instances of

> them with the possibility of becoming people with no country. Some felt that a "yes" answer could have been a trap to identify Japan sympathizers since it could be interpreted as an admission of prior allegiance to Japan. A "no" answer to question 27 . . . could reflect less on disloyalty than a repugnance for incarceration . . . . Many wondered whether the "yes-yes" responders were going to be "rewarded" by being drafted, while the "no-no" responders were to be "rewarded" with continued incarceration or worse.

Iijima, *supra* note 32, at 403-04 (citing ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II 69 (Eric Foner ed., 1993); WEGLYN, *supra* note 32, at 136-38)). Moreover, the oath "was administered to a population that had just been uprooted, terrorized, and unjustly incarcerated." *Id.* at 403 n.61.

82. *E.g.*, Bert Eljera, *Once a Fugitive, Now a Hero,* ASIAN WEEK, Jan. 15, 1998, http://www.asianweek.com/011598/coverstory.html; Kaleena Seidlinger, *Profs Assess Self Inflicted Dangers to America,* DAKOTA STUDENT ONLINE, Nov. 1, 2001, *at* http://www.und.edu/org/ds/_issues/2001/11/02/news/dangers.html.

83. 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court upheld the conviction of Fred Korematsu for his refusal to obey the military's wartime exclusion orders. *Id.* at 219.

84. Yamamoto, Korematsu *Revisited, supra* note 50.

85. *Id.* at 9. In *Hirabayashi v. United States*, the Supreme Court sustained a conviction for the violation of a curfew imposed upon Japanese Americans. 320 U.S. 81, 83, 105 (1943), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

86. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

87. *Id.* at 1417.

government misrepresentation and concealment related to the internment cases and cited by Judge Patel in her coram nobis decision.[88] This governmental misconduct included: (1) the deliberate alteration and concealment from the courts of explicitly racist conclusions in the military's justification for Japanese American evacuation;[89] (2) the failure to disclose American intelligence reports, which concluded that Japanese Americans as a group did not represent a security threat and that directly contradicted the military's justification for internment;[90] (3) the concealment of intelligence reports that recommended the handling of potential disloyalty on an individual basis;[91] (4) the failure to present findings by the Federal Bureau of Investigation that the necessity for Japanese American evacuation was based "primarily on public and political pressure;"[92] and (5) the failure to advise of the absence of any verified act of espionage or sabotage by Japanese Americans.[93] Thus, Professor Yamamoto concluded that:

> [The] lesson of *Korematsu* is that grave social injustice is possible in America during times of national frustration and fear if the government . . . is not held closely accountable to constitutional standards by courts. Despite this lesson and Justice Jackson's "loaded weapon" warning, *Korematsu's* principle of diminished government accountability lingers.[94]

Yamamoto contended although many view *Korematsu* as articulating "a strict standard of review, while according almost total deference to the military's unsubstantiated assertion of 'necessity' or as applying a rational basis standard of review," its true legal legacy is one that lacks governmental accountability with respect to the Japanese American exclusion orders.[95]

This lack of governmental accountability is even more critical in circumstances where race plays an important role.[96] Indeed, the racial

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88. Yamamoto, Korematsu *Revisited*, *supra* note 50, at 9-17.
89. *Id.* at 10-12, 16.
90. *Id.* at 12-14, 16.
91. *Id.* at 14, 16.
92. *Id.* at 15-16.
93. *Id.* In particular, on February 14, 1942, General John Dewitt, Military Commander of the Western Defense Command, submitted a recommendation to the Secretary of War recommending a mass evacuation of all persons of Japanese ancestry from certain areas on the West Coast. *Id.* at 8 n.24. Several days later, President Franklin D. Roosevelt issued Executive Order 9066, which authorized the military to effectuate the evacuation and internment of Japanese Americans. *Id.*
94. *Id.* at 30-31 (citations omitted).
95. *Id.* at 31 n.115.
96. *See id.*

underpinnings of *Korematsu* are even more evident in the *Hirabayashi* companion case.[97] In *Hirabayashi*, Justice Stone, writing for the majority, concluded that since "social, economic and political conditions" had worked to prevent Japanese assimilation into the white population, it "may well have tended to increase . . . their attachments to Japan and its institutions."[98] This kind of racial-logic undergirding the internment cases has led one scholar to remark that the cases

> [A]re not examples of strict judicial oversight at all, but of the opposite practice: judicial deference to the executive branch, specifically the military . . . [that] not only gives too much unchecked power to the Executive, but also reinforces racial myths by using them as tools of legal reasoning.[99]

IV. THE RACIAL UNDERPINNINGS OF *HAMDI*

Given the historical record of government misrepresentation in national security matters, the result in *Hamdi* is greatly troubling. Moreover, like *Korematsu*, *Hamdi* cannot be separated from its own racial underpinnings.[100] Since the result in *Hamdi* was individualized,[101] the Fourth Circuit did not feel constrained to rationalize its result as being free from racial considerations as did the *Korematsu* Court.[102] However, the post-September 11 racial environment lies at the heart of the decision because the *Hamdi* decision both reflects and exacerbates the racial construction of the terrorist "Other," and, in a real sense, relies upon that construction to blunt the effect of stripping an American citizen of his rights.[103] Similar to the racial atmosphere surrounding *Korematsu's* justification of its separation of Japanese Americans from "real" Americans, the "deAmericanizing" process of Arabs and Muslims was central to the rationalization of Hamdi's treatment as well.[104]

In fact, recent draft legislation authored by the Bush administration has as one of its provisions the ability of the government to strip the actual citizenship of any American who supports the activities of organizations

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97. *Hirabayashi*, 320 U.S. at 96, 98 (upholding military curfew for Japanese Americans).

98. *Id.*

99. Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 24-25 (2002).

100. *See* Hamdi III, 316 F.3d 450 (4th Cir. 2002).

101. *See Hamdi III*, 316 F.3d at 475.

102. *Id.*; Korematsu v. United States, 323 U.S. 214, 216 (1944).

103. *See Hamdi III*, 316 F.3d at 471-74.

104. *See id.*; *Korematsu*, 323 U.S. at 216.

that the government deems to be "terrorist."[105] It has been speculated that this proposed legislation may be to counter criticism of the manner in which the government has treated Yaser Hamdi and others who are American citizens.[106] The draft legislation also explicitly reinforces the notion of constructing American identity in opposition to the foreign "Other" and reifies it into law itself.[107] Professor Leti Volpp expresses this notion succinctly:

> In the American imagination, those who appear "Middle Eastern, Arab, or Muslim" may be theoretically entitled to formal rights, but they do not stand in for or represent the nation . . . . The consolidation of American identity takes place *against* them . . . . Thus, one may formally be a U.S. citizen and formally entitled to various legal guarantees, but one will stand outside of the membership of kinship/solidarity that structures the U.S. nation. And clearly, falling outside the identity of the "citizen" can reduce the ability to exercise citizenship as a political or legal matter. Thus, the general failure to identify people who appear "Middle Eastern, Arab or Muslim" as constituting American national identity reappears to haunt their ability to enjoy citizenship as a matter of rights . . . ."[108]

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105. *E.g.*, Joanne Mariner, *Patriot II's Attack on Citizenship*, FINDLAW'S LEGAL COMMENTARY, Mar. 3, 2003, *at* http://writ.findlaw.com/mariner/20030303.html. Mariner stated "[s]ection 501 of the bill [the Domestic Security Enhancement Act, informally known as "Patriot II"], deceptively titled "Expatriation of Terrorists," would provide for the presumptive denationalization of American citizens who support the activities of any organization that the executive branch has deemed 'terrorist.'" *Id.* Indeed, the act denationalization provisions would extend to support of even the legal activities of such an organization. *Id.*

106. *Id.* "Patriot II" would also expand the reach of the original *USA Patriot Act* by allowing the government even more surveillance powers, curtailing the right to sue for constitutional violations, strengthening the government's ability to detain secretly, among other provisions. Anita Ramasastry, *Patriot II: The Sequel Why It's Even Scarier than the First Patriot Act*, FINDLAW'S LEGAL COMMENTARY, Feb.17, 2003, *at* http://writ.news.findlaw.com/ramasastry/20030217.html.

107. Mariner, *supra* note 105.

108. Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1594-95 (2002) (emphasis added). Yamamoto and Serrano also point out that although President Bush rhetorically distanced himself from the racial profiling of Muslims and Arabs:

> [T]he government actions potentially raised the ugly specter of guilt-by-association ("if you're not with us, you're against us"). This principle, for some, was a coded reference to ancestry, casting suspicion on all persons of Arab descent. Indeed the FBI and INS reportedly commenced racial profiling investigations and detentions . . . .

Yamamoto & Serrano, *supra* note 18, at 54.

Gil Gott has described the Japanese American internment as a "key discursive event," which "helped reestablish racial unity of the national self."[109] This is echoed in the recent increasing "racialization" of the terrorist "enemy."

Professor Natsu Saito, even before the attacks on September 11 occurred, prophetically warned of the way in which Arab Americans were being "'raced' as 'terrorists.'"[110] Professor Saito observed that there was a possibility of the internment of Arab Americans because, similar to Asian Americans, Arab Americans had been stereotyped in the larger culture as "foreign, disloyal, and imminently threatening."[111]

Professor Volpp has incisively explored the racial profiling of Arabs and Muslims since September 11.[112] Indeed, she asserts that there is a public consensus that racial profiling is even a good thing with respect to national security.[113] She has articulated the ways in which these groups have been racially targeted and how that targeting has been legitimatized: (1) the sweep of 1200 noncitizens—primarily from Arab or Muslim countries—for "investigation" to prevent terrorist attacks, although no one detained has been identified as engaged in terrorist activity;[114] (2) the conducting of more than five thousand investigatory interviews of male non-citizens from Middle Eastern or Islamic countries on non-immigrant visas;[115] (3) the selective enforcement of removal for those non-citizens from countries with "Al Qaeda terrorist presence";[116] (4) airline and airport racial profiling of passengers who appear Middle Eastern or Arab;[117] (5)

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109. Gott, *supra* note 18, at 269.

110. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001).

111. *Id.*

112. Volpp, *supra* note 108, at 1576-86.

113. *Id.* at 1576-77 ("There was a strong belief [pre-9/11] that racial profiling was inefficient, ineffective, and unfair. This all seems a distant memory. There is now public consensus that racial profiling is a good thing, and in fact necessary for survival." (citations omitted)).

114. *Id.* at 1577-78. Professor Volpp notes, "[w]e in fact do not know the cumulative total of persons that have been put in detention, because the government has refused to release this figure to the public since November 2001." *Id.* at 1577 n.6.

115. *Id.* at 1578.

116. *Id.* at 1579. In December of 2002, two thousand Iranian Americans demonstrated in Los Angeles to protest the arrests of Middle Eastern immigrants who had voluntarily registered with the INS. *Iranian Americans Protest Immigration Policy*, CNN.COM, Dec. 19, 2002, *at* http://www.cnn.com/2002/US/West/12/18/ins.protest. The FBI is engaged in a project of surveilling hundreds of Muslim men in the United States, including twenty-four hour taps on their telephone calls, e-mail messages, and internet use. Philip Shenon & David Johnston, *Seeking Terrorist Plots, F.B.I. is Tracking Hundreds of Muslims*, N.Y. TIMES, Oct. 6, 2002, at A1.

117. Volpp, *supra* note 108, at 1580.

anti-Arab violence and hate crimes that are rationalized not as hate crimes, but crimes of passion or as a misdirected sense of patriotism.[118]

The ideological result of this profiling "is the legitimation of the religious and modern imperative to eradicate . . . the forces of despotism, terror, primitivism and fundamentalism, each of which are coded as Middle Eastern, Arab, and Muslim."[119] As such, the relationship of this contemporary racial environment to the racial logic in *Korematsu* is more clear.[120] Group identification and determinism are the ways in which nonwhites, specifically in the contemporary context, Arabs, Muslims, South Asians, and Middle Easterners, are to be evaluated as distinct from the way in which whites are viewed as autonomous individuals.[121] Thus, Professor Volpp concludes that, similar to Japanese Americans during World War II, the fungibility of members of a racially defined group makes it impossible to screen our individual loyal citizens from enemy aliens.[122]

Professor Leonard Baynes has recently documented precisely what Professor Volpp has theorized.[123] He compared the media coverage of Charles Bishop, a teenager who flew a small plane into an office building in Tampa, Florida and left a note expressing support for Osama bin Laden, and John Walker Lindh, captured by American soldiers in Afghanistan while serving as a soldier for the Taliban.[124] He concluded that "the coverage of each perpetrator changed over time to mirror changing perceptions of each man's 'racialized identity.'"[125]

Professor Baynes observed that the coverage of Charles Bishop, who was first thought to be white, centered around a "what went wrong with his upbringing?" approach until it was discovered that he was one-half

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118. *Id.* at 1589-90.

119. *Id.* at 1582.

120. *See Korematsu*, 323 U.S. at 222-23.

121. Volpp, *supra* note 108, at 1583-85. Professor Volpp writes:

> Under the logic of profiling all people who look like terrorists under the "Middle Eastern" stereotype, all whites should have been subjected to stops, detentions, and searches after the Oklahoma City bombing and the identification of [Timothy] McVeigh as the prime suspect. This did not happen because Timothy McVeigh did not produce a discourse about good whites and bad whites, because we think of him as an individual deviant, a bad actor. We do not think of his actions as representative of an entire racial group. This is part and parcel of how racial subordination functions, to understand nonwhites as directed by group-based determinism but whites as individuals.

Id. at 1584-85 (citations omitted).

122. *Id.* at 1591.

123. Baynes, *supra* note 59, at 40-46.

124. *Id.*

125. *Id.* at 62.

Syrian.[126] At that point, Professor Baynes noted that his coverage became less favorable, and that "the news media speculated that [his] ethnicity might have had something to do with his behavior."[127] In contrast, Baynes points out that John Walker Lindh was first shown in a photograph with "long dark hair, a beard, and a face darkened by dirt."[128] "[H]is darkened features made him appear to be something other than a white American."[129] However, once the media began to make it clear he was a white member of Generation X, the coverage became more favorable.[130] News stories began appearing comparing him to children of average Americans.[131]

Thus, the same kind of racial reasoning underlies the judicial deference in both the cases of *Korematsu* and *Hamdi*.[132] In the former, the assumption of group disloyalty was explicit, in the latter the assumption forms the backdrop to and the implicit justification for a draconian decision and result:[133]

> [T]he "Arab" racial construct has rapidly taken center stage in the wake of September 11 . . . . [T]he fact that racial assumptions are accepted as "common sense" does not mean that they underlie

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126. *Id.* at 45.

127. *Id.* at 41.

128. *Id.* at 45.

129. *Id.*

130. *Id.*

131. *Id.* Indeed, Professor Baynes noted that the media coverage of Walker Lindh's eventual plea agreement was relatively light in comparison to other newsworthy and controversial criminal proceedings such as the O.J. Simpson verdict. *Id.* at 46 n.281.

132. *Korematsu*, 323 U.S. at 223-24; *Hamdi III*, 316 F.3d at 475-76. It is worthwhile to note the recent sentiment that has attempted to "sanitize" the Japanese American internment. Associated Press, *N.C. Rep.: WWII Internment Camps Were Meant to Help*, FOXNEWS.COM, Feb. 5, 2003, *at* http://www.foxnews.com/story/0,2933,77677,00.html. Representative Howard Coble, R-N.C., the chairman of the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security, stated on a radio program in response to a caller's suggestion that Arabs be interned, that the internment camps were established to "protect" Japanese Americans. *Id.* He added that "[s]ome [Japanese Americans] probably were intent on doing harm to us just as some of these Arab-Americans are probably intent on doing harm to us." *Id.*

Indeed, it has been noted that even Chief Justice William Rehnquist has been muted in his criticism of the internment. Yen, *supra* note 50, at 2-3 (reviewing Chief Justice Rehnquist's essay *When the Laws Were Silent*, *see* William H. Rehnquist, *When the Laws Were Silent*, AM. HERITAGE, Oct. 1998, at 77-89).

133. *Korematsu*, 323 U.S. at 218-19; *Hamdi III*, 316 F.3d at 475-76; *see also* Joo, *supra* note 99, at 31:

> It is common to describe discrimination and racial profiling as panicked responses to perceived crises, or as specific individuals' acts of malice. But such arguments wrongly make this kind of injustice seem like anomalous, random events that are unforeseeable and unpreventable. In fact, they are expressions of commonly held and unquestioned racial ideology.

Joo, *supra* note 99, at 31.

> every government decision that affects people of color. But it does mean that they often escape notice . . . . Race and executive power are closely intertwined in the current national security crisis, as they have been in past crises, real and perceived. Excessive deference to the Executive may legitimate racial reasoning, and racial reasoning may legitimate expansion of executive power.[134]

The racial subtext of the *Hamdi* decisions is highly reminiscent of the subtext at play in the government's prosecution and persecution of Dr. Wen Ho Lee.[135] Describing all-too-familiar allegations, Helen Zia has written:

> FBI agents had to persuade a federal judge to imprison Dr. Lee because he was so dangerous, so inscrutable, such a threat to national security he should be locked up, pretrial. Their arguments were so chilling that Dr. Lee was held in solitary confinement and maximum security, complete with shackles and chains. The FBI argued that Dr. Lee's mere "hello" might contain a secret message for agents from China—messages that could result in the production of an advanced nuclear warhead.[136]

As has been pointed out by many scholars, the racial subtext of the Lee case—echoing the racial assumptions about Japanese Americans underlying their internment—was the underlying assumption that as a person of Chinese descent, Dr. Lee's loyalty was automatically suspect.[137] It is that kind of prevalent assumption about people of color that lends additional resonance and salience to its similarity to the *Hamdi* case.[138] But

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134. Joo, *supra* note 99, at 46-47.

135. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION, *supra* note 10, at 472. Dr. Lee, a Los Alamos nuclear scientist, was a naturalized American citizen for twenty-five years when it was revealed that he had been the target of a four-year federal espionage investigation. *Id.* at 464-74. He was charged with fifty-nine counts of downloading secret information. *Id.*

136. Helen Zia, *Oh, Say, Can You See?: Post September 11*, 27/28 AMERASIA J. 2, 9 (2001-2002). It should be pointed out how similar the government's representations about Dr. Lee's alleged ability to convey "secret codes" are to their representations about Jose Padilla's potential to contact al Qaeda terrorists through counsel. Padilla v. Bush, 233 F. Supp. 2d 564, 603-04 (S.D.N.Y. 2002) [hereinafter Padilla I]; *see infra* text accompanying notes 156-158.

137. For an exploration of the Wen Ho Lee case and its racial underpinnings, *see, e.g.*, YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION, *supra* note 10, at 464-74; Joo, *supra* note 99, at 7-14.

138. *Hamdi III*, 316 F.3d at 475-76. It should be pointed out here that I am drawing no conclusions about the guilt or innocence of Mr. Hamdi, nor am I attempting to equate the situation or culpability of Dr. Lee or Fred Korematsu to that of Mr. Hamdi. My sole purpose is to illustrate how unstated racist assumptions have express manifestations in judicial results and the dangers of abandoning any judicial oversight of the government's

of even greater relevance to the *Hamdi* case is the fact that the government's case against Dr. Lee and its assertions of his threat to national security began to unravel at the point where the truth of the government's allegation was tested.[139] It became apparent: (1) that the government had suppressed internal documents indicating that Dr. Lee was not guilty of espionage; (2) that key FBI investigators acknowledged that facts had been misstated to the court; (3) that Dr. Lee's FBI lie detector test in which he had denied any espionage activity had indicated a high degree of honesty; (4) that ninety-nine percent of the information that Dr. Lee had downloaded was already in the public domain; and (5) that the government had engaged in explicit racial profiling in their targeting of Dr. Lee.[140] Thus, the lesson for the *Hamdi* court is clear:

> While the *Hamdi* court pays lip service to "meaningful judicial review" and confines its precise holding to seizures taking place in combat zones abroad, its decision ignores the broader teachings of Anglo-American history from 1627 through the prosecution of Dr. Wen Ho Lee—in which executive allegations of devastating threats to national security collapsed when subjected to adversary testing before an independent judiciary.[141]

V. *PADILLA V. BUSH*: WHEN IN A WORLD OF NOTHING A PITTANCE CAN APPEAR AS PLENTY

The Fourth Circuit's deference is also troubling in the context of another equally troubling post 9/11 case involving another American citizen and alleged terrorist, Jose Padilla.[142] Mr. Padilla, born in Brooklyn, New York, was the subject of sensational reports alleging that he was a member of the al Qaeda terrorist network who was involved in a plot to detonate a radioactive "dirty bomb" in the United States.[143] After a flurry

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allegations.

139. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION, *supra* note 10, at 473.

140. *Id.* Dr. Lee pled guilty to one count of unauthorized possession of national defense material. *Id.* At his plea hearing, the district court judge apologized to Dr. Lee "for the unfair manner in which you were held in custody by the executive branch." *Id.* at 474.

141. Eric M. Freedman, *Lest We Forget:* Hamdi *and the Case of the Five Knights*, LEGALTIMES, Feb.3, 2002, at 60.

142. Padilla I, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

143. *Id.* at 569-572; Dan Eggen & Susan Schmidt, *'Dirty Bomb' Plot Uncovered, U.S. Says: Suspected al Qaeda Operative Held as 'Enemy Combatant'*, WASH. POST, June 11, 2002, at A1. Padilla was reported to have converted to Islam and changed his name to Abdullah al Muhajir. *Id.* A "dirty bomb" is a device combining radioactive material and conventional explosive. *Id.*

of government announcements linking Padilla to various al Qaeda terrorist plots, it became increasingly clear that Padilla was not, in fact, closely connected to al Qaeda.[144] Moreover, according to reports of U.S. intelligence officials, the plot was "blown out of proportion."[145]

Padilla was arrested in May of 2002, on a material witness warrant to secure his testimony before a grand jury investigation into the September 11 attacks.[146] On June 9, 2002, the government disclosed that the President had designated Padilla as an "enemy combatant."[147]

Despite the fact that the circumstances surrounding his detention were even more attenuated than Mr. Hamdi's, and despite the fact that he was nowhere near any combat in Afghanistan, he was nevertheless detained without formal charges and without the prospect of release from a naval brig in South Carolina.[148] In addition, it was undisputed that he was held incommunicado and had not been permitted to confer with counsel.[149] Padilla petitioned for habeas corpus relief, challenging both the lawfulness of his detention as well as an order prohibiting him from consulting with counsel.[150]

Significantly, attached to the Presidential Order classifying Padilla as an "enemy combatant" was also a declaration by Michael Mobbs (the Mobbs Declaration), which set forth a version of facts "as the basis for the conclusions set forth in the June 9 Order."[151] Similar to their position in *Hamdi*, the government argued that the Mobbs Declaration was sufficient to establish the correctness of the Presidential findings, which led to Padilla's "enemy combatant" designation.[152] United States District Court

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144. Christopher Newton, *Officials Downplay Terror Suspect*, AP ONLINE, Aug. 13, 2002, *available at* 2002 WL 25139054.

145. Michael Isikoff, *And Justice for All: John Ashcroft Crowed of the Arrest of Alleged 'Dirty Bomber' Jose Padilla. But Do the Feds Have a Case?* NEWSWEEK, Aug. 19, 2002, at 32.

146. *Padilla I*, 233 F. Supp. 2d at 569.

147. *Id.*

148. *Id.*

149. *Id.* at 574.

150. *Id.* at 569.

151. *Id.* at 572.

152. *Id.* The Mobbs Declaration stated in pertinent part that Padilla was born in New York and convicted of various crimes including murder and weapons charges; that he moved to Egypt and took the name Abdullah al Muhajir; that in 2001 while in Afghanistan he had contacted senior al Qaeda officials and had proposed stealing radioactive material and detonating a "radiological dispersal device" within the United States; that he had done research for such a project and discussed others with different al Qaeda officials at various locations in Pakistan. *Id.* at 572-73. In addition, the government submitted under seal another unredacted version of information related to the President's designation (the "Sealed Mobb's Declaration"). *Id.* at 572.

Judge Michael Mukasey held that the President had the authority to designate as an enemy combatant an American citizen captured on American soil.[153] However, he continued by stating that:

> Although Padilla has the ability, through his lawyer, to challenge the government's naked legal right to hold him as an unlawful combatant on any set of facts whatsoever, he has no ability to make fact-based arguments because, as is not disputed, he has been held incommunicado during his confinement . . . and has not been permitted to consult with counsel. Therefore, unless I find that the only fact issue Padilla has a right to be heard on is whether the government's proffered facts, taken alone and without right of response, are sufficient to warrant his detention by whatever evidentiary standard may apply—an argument that can be presented by counsel without access to Padilla—I must address the question of whether he may present facts, and how he may do so.[154]

Judge Mukasey found that Congress had plainly intended that a habeas corpus petitioner would be able to place facts and issues of fact before a court and that refusing to allow Padilla to do so "would frustrate the purpose of the remedy."[155]

The government in opposition argued that affording Padilla access to counsel would interfere with his questioning and contended that access to counsel would be dangerous because "al Qaeda operatives are trained to use third parties as intermediaries to pass messages to fellow terrorists . . . ."[156]

The court disagreed with the government's first contention because it believed any interference with the questioning of Padilla by the access to counsel for the limited purposes related to the habeas corpus petition would be "minimal or nonexistent."[157] Perhaps more telling was the court's view that the government's conjecture that Padilla could use his counsel to pass facts on to al Qaeda operatives based upon the allegations contained in the Mobbs Declaration was "gossamer speculation."[158]

However, rather than subjecting the government to a meaningful review as District Court Judge Doumar had done in *Hamdi*, Judge Mukasey continued by outlining the evidentiary standard by which he would

153. *Id.* at 588-89.
154. *Id.* at 599.
155. *Id.* at 600.
156. *Id.* at 603.
157. *Id.*
158. *Id.* at 604.

determine whether the facts presented by the government in support of its "enemy combatant" designation were sufficient.[159] He began by noting that "it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't. *Ex parte Quirin* offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant."[160]

> The court concluded by stating that it would examine only
> [W]hether there is some evidence to support [the President's] conclusion that Padilla was . . . engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and . . . whether that evidence has not been entirely mooted by subsequent events.[161]

While the "some evidence" standard is facially more than the "no evidence" standard applied by the Fourth Circuit, it is important to note that this evidentiary standard is being applied to a citizen who is facing incarceration for an indefinite period as an "enemy combatant."[162] Thus, the "some evidence" standard is still lower than even the burden to prevail in a civil lawsuit and certainly much lower than the burden in a criminal case.[163] Moreover, with such a low threshold it is unlikely that a government "enemy combatant" designation could ever be effectively challenged.[164]

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159. *Id.* at 605-10.

160. *Id.* at 607 (citing *Ex parte* Quirin, 317 U.S. 1, 19 (1942)).

161. *Id.* at 608. In a subsequent ruling upon a government motion to reconsider his ruling in *Padilla I*, Judge Mukasey again rejected the government's contention that doing so would hinder anti-terrorism efforts. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 43 (S.D.N.Y. 2003) [hereinafter *Padilla II*].

162. *See* Hamdi III, 316 F.3d 450, 473-74 (4th Cir. 2003).

163. DOHERTY ET AL., IMBALANCE OF POWERS, *supra* note 27, at 65. Judge Mukasey articulated the "some evidence" standard as "the opportunity to present evidence that undermines the reliability of the Mobbs Declaration." *Padilla II*, 243 F. Supp. 2d at 56.

164. On December 18, 2003, shortly before this piece was going to press, the Second Circuit Court of Appeals held that absent express congressional authorization, "the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat." Padilla v. Rumsfeld, Docket Nos. 03-2235 (L), 03-24-38 (Con.); 2003 U.S. App. LEXIS 25616, at *5 (2d Cir. Dec. 18, 2003). In essence, using the framework set out in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for analyzing the legitimacy of an exercise of Executive power, the Second Circuit concluded that the President did not have "clear congressional authorization" pursuant to the Non-Detention Act, 18 U.S.C. § 4001(a) (2000) and that Congress's Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) (hereinafter "Joint Resolution") passed after the September 11th attacks to take such action. *Id.* at *6. It is instructional and important to note that the court expressly avoided addressing the issue of the detention of an American citizen seized

within a zone of combat such as in the case of Ysar Hamdi. *Id.* at *7.

As to the substantive issue of Padilla's detention as an "enemy combatant," the Second Circuit found that the President lacked inherent constitutional authority to detain American citizens on American soil outside a zone of combat. Citing Congressional power to define and punish offenses against the law of nations (the "Offenses Clause"), the power to suspend the writ of habeas corpus (the "Suspension Clause") and the Third Amendment (allowing congressional authority to quarter of troops in private homes time of war), the Second Circuit declared that the Constitution lodges the power to effect "significant domestic abridgements of individual liberties" to the Congress, not to the Executive, during national emergencies. *Id.* at *55-56. Thus, the court concluded that "while Congress - otherwise acting consistently with the Constitution - may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not." *Id.* at *57.

Moreover, the Second Circuit quickly distinguished *Ex parte Quirin*, 317 U.S. 1 (1942) which the government had used to argue that the President had such inherent authority. First, the court stated that the "*Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization" and was silent as to whether the President had the power to impose such tribunals absent congressional approval. *Id.* at *59. Moreover, the petitioners in *Quirin* had admitted that they were soldiers in the armed forces of a nation at war against the United States, a fact clearly in dispute in Padilla's case. *Id.* at *61. But perhaps most importantly, *Quirin* was decided in 1942 before the Non-Detention Act was promulgated. *Id.* at *60. The Non-Detention Act provided in relevant part that "No citizen of shall be imprisoned or otherwise detained by the United States except pursuant to an Act by Congress." 18 U.S..C. § 4001(a) (2000). It is significant that the Second Circuit specifically pointed to the legislative history of the act in which references were made to the detention of Japanese American citizens during World War II (both detentions, incidentally, the court noted were authorized by both the Executive as well as the Congress). *Id.* at *68. Thus, military detentions were to be covered under the act. *Id.* Yet, citing a Japanese internment case in which the Supreme Court granted habeas corpus relief to a Japanese American internee, *Ex parte Endo*, 323 U.S. 283, 298-300 (1944), it held that the Joint Resolution did not authorize the detention of American citizens which the *Endo* Court had expressly directed had to be done by clear and unmistakable language within the grant of powers to restrain citizens. *Id.* at *80. For an insightful discussion of the *Endo* case, in terms of both the narrowness of its holding as well as its timing coming one day after the War Department announced the release of Japanese internees, *see* YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS, *supra* note 10, at 173-175. In conclusion, absent any further authorization from Congress giving the President additional authority, the Second Circuit directed the district court to issue a writ of habeas corpus to release Padilla within 30 days, after which time the government could transfer him to civilian authorities for appropriate action. *Id.* at *84.

What perhaps is most ironic in this careful and thoughtful opinion by the Second Circuit is the striking manner in which the focus remained on the power and inherent authority of the Executive and Congress in times of national emergency. However, it still leaves completely unaddressed the underlying dangers of that authority when utilized by a unprincipled government fueled by popular, but dangerous, national sentiment. It bears noting that at least in terms of Japanese American internment, the issue of whether there was "legitimate" authority to imprison the entire community to this day has never been officially repudiated by the Supreme Court. Indeed, the Japanese American experience illustrates vividly that justice cannot solely lie in the "legitimate" exercise of power—as important as that may be—it must also lie in moral and political courage and integrity in times of national stress. Here, as in Mr. Hamdi's case, the government's bare assertion of Mr. Padilla's culpability, historically and repeatedly suspect in so many other instances, still goes

INTERLUDE

I have always been uncomfortable with one of the standard arguments made against Japanese American internment. I have heard it often said that the internment was unjustified because there was never any evidence of any Japanese American sabotage or espionage. I always cringe when anyone says this because, of course, this argument implicitly endorses the notion that the internment of the Japanese community would have been less racist if there were Japanese American individuals who had committed such actions.

Similarly, I have always felt vaguely uncomfortable saying that we must never let something like the Japanese American internment happen again because there was something implicit about American justice in that statement as well, but I just could not articulate it.

Recently, Natsu Saito said something at a conference that crystallized it for me.[165] *She talked about how the historical suppression of American progressive movements and the subordination of people of color have always been about the maintenance of a race and class status quo.*[166] *She*

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unchallenged. Indeed, the final words of Judge Wesley's dissent bear repeating at length:

> Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.
>
> While these concerns may be valid, they cannot withstand the force of another clause of the Constitution on which all three of us could surely agree. No one has suspended the Great Writ . . . .
>
> . . . .
>
> Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause - whatever it may be - but by the constitutional and statutory validity of the powers invoked against him.

Id. at *108-10.

165. Natsu Saito, Law Professor, Georgia State University College of Law, Remarks at Takings—Second Joint Conference of the Asian Pacific American Law Faculty (CAPALF)/the Western Law Teachers of Color (Mar. 21, 2003) [hereinafter Saito, Remarks]; Takings—Second Joint Conference of the Asian Pacific American Law Faculty (CAPALF)/the Western Law Teachers of Color, *at* http://www.law.seattleu.edu/takings/index.asp (last visited Nov. 28, 2003).

166. Saito, Remarks, *supra* note 165.

pointed out that any threat to that hierarchy was labeled "unAmerican."[167] *She reminded us that just as the internment was no aberration, so too was the present assault on civil liberties.*[168] *And it struck me that there have always been subtle and not-so-subtle "internments"—starting with the incarceration and genocide of the indigenous people at the very inception of our nation—before and after the Japanese American one. Some are more blatant than others. Some are more pointed than others. But all seek to silence and to intimidate.*

VI. McCARTHYISM AND THE UNAMERICANISM OF PROGRESSIVE CHANGE

The erosion of civil liberties, of course, is not only marked by the explicitly racial results in *Korematsu*.[169] The erosion of civil liberties is also rationalized as a means to preserve a sense of national emergency often to disguise another political and social agenda.[170] Mari Matsuda has made the cogent observation that: "[j]ust at the moment when overt racism . . . was becoming publicly illegitimate, anti-Communism was becoming patriotic. McCarthyism's contradictions were not delegitimitizing in the way that white supremacy's contradictions were . . . ."[171]

Thus, Matsuda concludes that McCarthyism's stripping of the labor movement's most effective organizers, the chilling of dissent, "the legitimization of greed and [ ] the income gap," the justification for the Cold War and the military/industrial complex, "was not a mere by-product . . . . It was the goal . . . ."[172] Professor Natsu Saito has explained the historical attack on civil liberties was motivated "not to ensure the security of the general public, but to suppress political movement and sectors of the population who are viewed as a threat to the status quo."[173]

The outsider and racial threat explicit in Japanese American

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167. *Id.*

168. *Id.*

169. 323 U.S. 214, 222-23 (1944).

170. Gott, *supra* note 18, at 211. Gott stated:

> Postwar erosions of personal liberties, undertaken in the name of state interest, are legion and well known. In a series of Supreme Court cases of the early Cold War era, communism—functionally the internal ideological equivalent of the external Soviet threat—assumed constitutionally taboo status as the Court began authorizing a regime of guilt by association: free speech and association restrictions, ideological grounds for deportation, and loyalty oaths were approved by the Court.

Id.

171. Matsuda, *supra* note 7, at 22 (footnote omitted).

172. *Id.* at 21.

173. Saito, *Seventh Annual Latcrit Conference*, *supra* note 34, at 1060.

internment was bounded by the parameters of immediacy, the duration of the world war.[174] However, it was McCarthyism's anti-communism that transformed the external threat into a simultaneous internal and perpetual one; one from that the nation constantly and perpetually needed protection.[175] Indeed, the "end result of red-baiting replacing race-baiting in elite discourse was the elimination of a progressive social agenda with economic justice at its core."[176]

Matsuda brilliantly draws the relationship between McCarthyism's hounding of progressive activists and the internment:

> The justification for their persecution was the danger of a monolithic, secret, evil threat of worldwide Communism. Here is where McCarthyism links clearly with the internment. It admits of no complexity and leaves no room for individual determination. There is a group among us, that is not us, that is out to destroy us, that must be cabined, contained, and removed. Our very survival is at stake, making talk of civil liberties and due process a luxury. Let's survive first, then we can start talking about human rights.[177]

Indeed, the McCarthyite rhetoric was of external, worldwide threat, and the increased need for national security to counteract the evils of communism.[178] This was juxtaposed with the necessity to contain domestic manifestations of that external threat.[179] This past rhetoric is hauntingly familiar today. Even more disturbingly, today's rhetoric is reminiscent both of the way that Japanese American internment masked America's racism under the rhetoric of national security,[180] as well as the way in which

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174. Gott, *supra* note 18, at 201. Gott stated:

> Ironically, of course, the supposed anarchy of the "external" was set loose internally, having grown from conditions uniquely domestic and American. Again, rhetorically, lawless state action was characterized as necessary in light of the external threat, the chaos of the international realm. But an inversion of this relationship may better describe the state of events: internal conditions of raw racial domination and white supremacy conditioned the state's conduct in its war effort.

Id.

175. Matsuda, *supra* note 7, at 23 ("Public racism and anti-Semitism were replaced with public anti-Communism, putting the old fear and hatred in a new, more comfortable place . . . . [E]xplicit racism/anti-Semitism largely ceased at the moment when open anti-Communism became the more effective, post-World War II language of power.")

176. *Id.* at 24.

177. *Id.* at 14.

178. *See* Matsuda, *supra* note 7, at 23-24; Gott, *supra* note 18, at 201.

179. *See* Matsuda, *supra* note 7, at 23-24; Gott, *supra* note 18, at 201.

180. Matsuda, *supra* note 7, at 21 ("The threat of the outside invader was used to mask class interests . . . .")

McCarthyism masked the hegemony of reactionary political interests such that "[t]he social criticism and activist practice required to keep a structural analysis of privilege at the forefront became unthinkable . . . ."[181]

Moreover, McCarthyism also made potent use of racism in its assault against the American people.[182] Indeed, the "foreigner" security threat used so powerfully against Japanese Americans during World War II[183] was equally effective when used against Chinese Americans after the victory of the Communist Party in China.[184]

In 1955, the Second Circuit upheld the convictions of several men of Chinese ancestry for violating the *Trading with the Enemy Act*.[185] The "crime" was sending money home to relatives in the then emerging People's Republic of China.[186] The prosecution and the eventual sentencing of the defendants was meant to send a message to the Chinese community about its support for the new China.[187]

There is a powerful and important film documentary entitled *The Chinatown Files*, which explores the *China Daily News* case, the harassment of progressive Chinese by the FBI, and the general effect of McCarthyism on the Chinese American community in the aftermath of the Chinese Revolution.[188] From interviews with surviving activists from that era, one gains the indelible impression of how McCarthyism spread fear throughout the Chinese community.[189] The attorney for the defendants in the *China Daily News* case remembers the atmosphere surrounding the case:

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181. *Id.* at 26. During the McCarthy era, on the House of Representatives side, the House Committee on Un-American Activities (HUAC) targeted "any organization that advocated progressive causes" as a "Communist front" organization. *Id.* at 20.

182. *See* United States v. China Daily News, 224 F.2d 670, 671-72 (2d Cir. 1955).

183. *See Korematsu*, 323 U.S. at 223.

184. *See China Daily News*, 224 F.2d at 671-72.

185. *Id.*

186. *Id.* ("The other defendants (stockholder or stockholders and directors of the News) sent checks to relatives and acquaintances on the China mainland for the individual benefit of the recipients.").

187. *Id.* at 673. The Second Circuit stated:

> [The trial judge] was . . . undoubtedly impressed with the claim of the prosecution that this was a planned and extensive siphoning of funds from New York City into Communist China, and that strict enforcement of the law was required in order to deter the Chinese community in general from further violations of the statute and regulations.

Id.

188. THE CHINATOWN FILES (Amy Chen & Ying Chan 2001). For a description of the film and its contents, *see* The Chinatown Files, *at* http://www.chinatownfiles.org (last visited Nov. 28, 2003).

189. *See* THE CHINATOWN FILES, *supra* note 188.

> They had a press conference before the case began which the government agencies claimed, that there was a planned and extensive conspiracy to siphon money to the communist government in China that involved murder and bribery and all kinds of terrible crimes. This was the climate that the government created and then admitted in court that there was no such thing . . . .
>
> . . . .
>
> Why did they choose these laundrymen [as defendants]? It was part of the build up of terrorizing people. Intimidating people, they chose these men who were defenseless, had no lawyers, who didn't hide what they had done. Who committed no crime as far as they're concerned then or as far as I'm concerned then or now. Because they could get away with it and it became clear that this case was not only intended to demonize these three men because they were Chinese,—there's a racist quality in this. But also it was intended, I believe, to intimidate the American people.[190]

Indeed, throughout the period, within the Chinese community there was a not-so-subtle subtext of potential internment camps for Chinese: "'I heard a lot of rumors that they were fixing up the concentration camps for the Chinese. My kid brother came in one day and he was really scared. I said 'what's the matter.' He said, 'I'm going to change my name to Wongamita. I'm going to be Japanese.'"[191]

The McCarthy era stands out as a particularly repressive time, but the activities of the government to suppress dissent and civil liberties were not restricted to the McCarthy era alone.[192] For example, during the height of the political activity surrounding the Vietnam War, including the rise of progressive and even revolutionary consciousness among communities of color, the government used concerted programs such as the FBI's Counterintelligence Program (COINTELPRO) to disrupt this kind of

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190. Amy Chen & Ying Chan, Transcript of *The Chinatown Files* 17 (2001) (on file with author).

191. *Id.* at 13.

192. Saito, *Seventh Annual Latcrit Conference*, *supra* note 34, at 1088-98. Natsu Saito has comprehensively reviewed the history of how the rhetoric of national security has been used to suppress movements for social justice throughout American history:

> [I]n attacking movements for social justice, the government has often justified its actions on the ground that these were actually movements for anarchy or communism, "alien" ideologies promoted by foreign powers. Not surprisingly, the linking of political protest to "sedition" has been most common in attempts to suppress antiwar activists.

Id. at 1067 (citations omitted).

"subversive activity."[193] This governmental activity was so blatantly repressive that even a congressional subcommittee, chaired by Senator Frank Church, found that these operations were "aimed squarely at preventing the exercise of First Amendment rights of speech and association . . . ."[194]

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193. *Id.* at 1079. For an overview of how the COINTELPRO targeted Communist and Socialist organizations, the Civil Rights Movement, the "New Left" and Antiwar Movement, the Black Panther Party, and the American Indian Movement among others, *see id.* at 1088-98.

"'[T]he FBI's COINTELPRO (Counterintelligence Program) and the CIA's Operation Chaos targeted subversive groups for surveillance and dirty tricks'" beginning in the 1970s. Roberta Smith, *America Tries to Come to Terms With Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 259 (1997) (quoting Donna M. Schlagheck, INTERNATIONAL TERRORISM: AN INTRODUCTION TO THE CONCEPTS AND ACTORS 102 (1988)); *see also* J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L.J. 129, 129-30 (2002). Smith states:

> Under COINTELPRO, the FBI developed over five hundred thousand domestic intelligence files on American citizens and groups, opening sixty-five thousand files in 1972 alone. The FBI also kept a list of twenty-six thousand individuals to be rounded up in case of a "national emergency". . . . Over a six year period, the CIA, under Operation Chaos, collected thirteen thousand files and other materials including the names of three hundred thousand people and organizations.

Smith, *supra* note 193, at 259 (citing Schlagheck, *supra* note 193, at 102-03).

194. Elijah, *supra* note 193, at 130. The Church Committee (officially called the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities), which issued the *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. REP. NO. 94-755 (1976) (commonly known as the "Church Committee" Report), found that the government's activity threatened the rights of "privacy, free speech and freedom of association." Smith, *supra* note 193, at 259; *see also* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 33-34 (2000) (citing S. REP. NO. 94-755, at 424-25). Banks and Bowman stated:

> For fifteen months the Church Committee, spurred by allegations of wrongdoing within the national intelligence system, conducted the first major inquiry of the intelligence community. The Committee found multiple shortcomings in intelligence operations, adverse effects of secrecy, failure by Congress to oversee intelligence activities, and in some cases, seemingly unlawful actions. More often, they found that activities of the intelligence community had violated individual privacy.
>
> The Committee determined that secret government activities, while necessary to the effectiveness of government, were, nevertheless, a threat to democratic society.

Banks & Bowman, *supra* note 194, at 33-34. The intelligence abuses were so great that: "[B]efore COINTELPRO was laid to rest, it was responsible for maiming, murdering, false prosecutions and frame-ups, destruction, and mayhem throughout the country. It had infiltrated every organization and association that aspired to bring about social change in America whether through peaceful or violent means."

It is in this troubling historical context that the *Hamdi* decision must be placed. The excesses of the government particularly with respect to national security concerns are always a matter for close and careful judicial oversight.[195] The abdication of that responsibility by the Fourth Circuit can neither strengthen nor protect our security as a nation, because the fountainhead of our security as a nation lies precisely in our freedoms.

CONCLUSION

The decision of the Fourth Circuit in *Hamdi* to rely solely upon the government's bare allegations to strip a United States citizen of all of his constitutional protections is a disturbing and dangerous precedent.[196] It more than merely echoes the long discredited decision of *Korematsu*.[197] It compounds it.

The Fourth Circuit decision ignores *Korematsu*'s historical lessons with respect to the credibility of the government's assertions in national security matters.[198] It is in conflict with contemporary judicial decisions—not only the district court decision it reversed but with another federal court

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Elijah, *supra* note 193, at 130; *see also* Saito, *Seventh Annual Latcrit Conference*, *supra* note 34, at 1081-88 (recounting how the FBI used tactics of surveillance and infiltration, dissemination of false information, creation of "intra- and inter-group conflict," abuse of the criminal system, and collaboration in assaults and assassinations).

It is also worth noting the effect that government's reaction to September 11 has had on prisoners completely unrelated to that tragedy. Elijah, *supra* note 193, at 132-33. Numerous prisoners who have been incarcerated for politically related activities were suddenly adversely affected:

> Within hours of . . . [September 11] several of . . . [these prisoners] were rounded up and put in administrative segregation, generally known as the hole. No charges or allegations were levied against them . . . .
>
> Some, like Marilyn Buck, Sundiata Acoli . . . and Richard Williams were held incommunicado for weeks without access to legal counsel . . . .
>
> . . . [O]n or about September 17, Attorney General John Ashcroft issued a memorandum to the Bureau of Prisons directing them to terminate all communications, both social and legal, for certain prisoners.

Elijah, *supra* note 193, at 132-33. (citations omitted).

Moreover, Lynn Stewart, an attorney noted for her representation of controversial client—for example, David Gilbert, a former member of the Weather Underground and Bilal Sunni-Ali, a member of the Republic of New Africa convicted in connection with an armed robbery and shooting of a Brinks armored vehicle—has recently been indicted for allegedly facilitating communications between her client, Sheikh Omar Abdel-Rahman, and "[t]he Islamic Group . . . described in the indictment as an 'international terrorist group . . .'" Elijah, *supra* note 193, at 134-36.

195. *See* Hamdi III, 316 F.3d 450, 463-65 (4th Cir. 2003).

196. Hamdi III, 316 F.3d 450, 463-65 (4th Cir. 2003).

197. 323 U.S. 214, 222-23 (1944).

198. *See Hamdi III*, 316 F.3d at 463.

reviewing identical material as well.[199] It reflects and exacerbates the underlying racial subtext of the "war on terror" just as the *Korematsu* case was driven by the racism of its era.[200] Finally, it portends a greater danger in that it reinforces and helps to legitimate an already frenzied atmosphere of political repression reminiscent of the McCarthy era, facilitating and legitimatizing the imposition of conservative domestic policies, which have draconian effects upon people of color and other subordinated groups. Indeed, *Hamdi* is part of an even larger threat to American freedoms because it gives the veneer of judicial objectivity and neutrality to the same impulses, prejudices, and agenda that drove the late Senator from Wisconsin and his cronies to wreak havoc upon the American public and their Constitution.[201]

EPILOGUE

Mari Matsuda has sounded a call for those of us who are of Japanese American descent. She tells us that military necessity is never an excuse we can accept without question. We are Japanese American and our "birthright is to question military necessity."[202]

My family and community were once deemed enemy aliens. When they were herded into animal stalls at Tanforan Racetrack; when they were shipped to desolate deserts afraid and alone; when they were vilified by their country, very few Americans questioned "military necessity" then.

Thus, with this piece I accept the responsibility that Mari has placed upon me and with it I exercise my birthright. I do so in the hope that others may escape the harsh consequences of the silence that political repression and "military necessity" impose.

199. *See* Padilla I, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

200. *See Korematsu*, 323 U.S. at 222-23.

201. *See* Gott, *supra* note 18, at 211.

202. Mari J. Matsuda, *Asian Americans and the Peace Imperative*, 27 AMERASIA J. 141, 142 (2002).